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Trusts - Savings and Loan Association Revocable Trust Accounts - Revocable Trust Accounts are Inter Vivos Trusts, Not Totten Trusts, Therefore, Not Revocable by Settlor's Will

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TRUSTS—SAVINGS AND LOAN ASSOCIATION REVOCABLE TRUST ACCOUNTS —REVOCABLE TRUST ACCOUNTS ARE INTER VIVOS TRUSTS, NOT TOTTEN TRUSTS, THEREFORE, NOT REVOCABLE BY SETTLOR'S WILL. In the recent case of *In re Estate of Anderson*, 69 Ill. App. 2d 352, 217 N.E.2d 444 (1st Dist. 1966), the Appellate Court for the First District of Illinois was confronted with the question of whether savings and loan association revocable trust accounts were express inter vivos trusts or merely tentative trusts and therefore revocable by the deceased settlor's will. A second issue involved was whether the interest of a surviving joint tenant under a valid joint tenancy with right of survivorship savings account could be affected by the will of the deceased joint tenant. The court held that under the facts presented, both forms of accounts were left unaltered by the will.

Prior to the execution of her will, Gussie Anderson, the decedent, had made deposits in two Chicago area savings and loan associations. The deposit in one association was made in the form of a revocable trust account. The deposits in the second association consisted of a joint savings account and another revocable trust account.[1] The petitioners in the Circuit Court were the surviving joint tenant and the beneficiaries of the trust accounts.

Thirteen months after opening the last savings account, Gussie Anderson executed a will naming her neice as sole legatee of all property in which she would die seized. The will specifically listed the above savings accounts as part of her personal estate. She died thirteen days later and the will was admitted to probate. The trust account beneficiaries and the surviving joint tenant filed a petition with the probate court praying that the court determine all questions of title to the savings accounts and find that they were the owners of the same in whole or in part.

The Probate Division of the Circuit Court entered an order finding that the beneficiaries of the trust accounts had a vested interest subject to revocation during the life of the settlor in accordance with the terms of the trust and that the power of revocation ceased at the settlor's death. Therefore, the trust was unaffected by the deceased settlor's will. The court also found that the surviving joint tenant was entitled to the funds in the joint tenancy account.

The legatee under the will and the executrix appealed from the order. The appellants contended that the will expressly revoked the trust accounts and rebutted the inference of any donative intent as to the joint savings account.

The contention that the will revoked the trust accounts was based

1 For the pertinent provisions of the savings account agreements and declarations of trust in full see *In re* Estate of Anderson, 69 Ill. App. 2d 352-5, 217 N.E.2d 444-6 (1st Dist. 1966).

on the assertion that the accounts were "Totten or tentative"[2] trusts and, as such, should be governed by Section 58 of the Restatement of Trusts (second edition). The Illinois Supreme Court in dealing with similar revocable trust accounts previously held that the above section was applicable.[3]

Section 58 states:

> Where a person makes a deposit in a bank in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust.

The appellants asserted that the Restatement comments on "Totten trusts" should be controlling: ". . . the mere fact that a deposit is made in a savings bank in the name of a depositor "as trustee" for another person is sufficient to show an intention to create a revocable trust. . . . Such a trust is often called a 'Totten Trust' . . ."[4] The comments further state that revocation of such trusts can be by means of the depositor's will.[5]

Relying on the contentions that the trust accounts were "Totten trusts" and regulated by the above comments, the appellants stated that the intent of the deceased, as manifested by her will, should be followed and the trust accounts should be considered revoked.

The court reviewed *Matter of Totten*,[6] which established the tentative trust rule. In that case, the decedent had opened several savings accounts as trustee for another person. The only indications as to the type of account intended were their titles. There were no specific trust agreements. The decedent retained complete control over the funds as evidenced by withdrawals. In disposing of the case, the court held that the settlor's intent to establish a trust account had been so indefinite that any act showing a contrary intent would revoke the trust. This included the settlor's last will and testament.

The court in *In re Anderson* distinguished that case on the fact that the present trust accounts were opened under the terms of the savings and

2 "Totten Trust. A trust created by the deposit by one person of his own money in his own name as a trustee for another and it is a tentative trust revocable at will until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration such as delivery of the pass book or notice to the beneficiary without revocation or some decisive act or declaration of disaffirmance the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." Black, Law Dictionary 1682 (4th ed. 1951).

3 *In re* Estate of Petralia, 32 Ill. 2d 134, 204 N.E.2d 1 (1965).

4 Restatement, Trusts 58, comment a (1959).

5 Restatement, Trusts 58, comment c (1959).

6 Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904).

loan's signature cards. These cards were express and comprehensive declarations of trusts which contained exact provisions concerning the deposit, disbursement and disposition of the funds, as well as specific provisions for the revocation of the trust. The trusts were revocable by withdrawal of the funds, changing of beneficiaries, or death of the beneficiary prior to the trustee. Such declarations of trust, the court held, were sufficient to create valid inter vivos trusts and vest title to the funds in the beneficiary.[7]

The difference between inter vivos trusts and tentative ones is a matter of the degree of evidence showing the settlor's intent to establish a trust. The intent to establish a trust was so indefinite in *Matter of Totten* that it was easily overcome. However, the intent to establish a trust was strongly evidenced by the trust agreements in *In re Anderson.*

Once a valid inter vivos trust has been established, the settlor can deal with the subject matter of the trust "only in accordance with the terms of the instrument."[8] Therefore, to determine the effect of the settlor's will, the court had to examine the provisions of the savings account trust agreements. There was no express provision for revocation by a will. The court held that the settlor's intention at the time the trusts were created must control and not subsequent contrary intention concerning the power of revocation.[9]

The court quoting from *Merchants' Nat'l Bank v. Weinold* held: "If the settlor reserves a power to revoke the trust by a transaction inter vivos, as for example, by a notice to the trustee, he cannot revoke the trust by his Will."[10] The trust accounts under present consideration contained only specific methods of inter vivos revocation. Consequently, the settlor could not revoke the trusts by her will as this would be inconsistent with her intent at the time the trusts were established.[11]

Furthermore, the court held that revocation by will is not contemplated by controlling statutes.[12] The express statutory method of revocation is by withdrawal of funds or changing of the beneficiary.

The Appellate Court affirmed the Circuit Court's decision by holding that the trust accounts were unaffected by the settlor's will.

The court then considered the effect of the will upon the joint savings account. The appellants contended that any intent that the deceased joint tenant may have had to make a gift of the funds on deposit to the surviving joint tenant was overcome by her will.

7 Farcas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955). Helfrich's Estate v. Commission, 143 F.2d 43 (7th Cir. 1944).

8 Farcas v. Williams, 5 Ill. 2d 417, 422, 125 N.E.2d 600, 604 (1955).

9 Restatement, Trusts § 4, comment a (1935).

10 Merchants' Nat'l Bank v. Weinold, 22 Ill. App. 2d 219, 225, 160 N.E.2d 174, 177 (1959). Restatement, Trusts § 330, comment j (1935).

11 Cohn v. Central Nat'l Bank, 191 Va. 12, 60 S.E.2d 30 (1950).

12 Ill. Rev. Stat. ch. 32, § 770b (1961).

In deciding the effect of the will upon the joint tenancy account, the court relied on *Murgic v. Granite City Trust and Savings Bank*,[13] wherein the Illinois Supreme Court stated:

> We hold that an instrument creating a joint account under the statutes presumably speaks the whole truth; and, in order to go behind the terms of the agreement, the one claiming adversely thereto has the burden of establishing by clear and convincing evidence that a gift was not intended. This burden does not shift to the party claiming under the agreement.

Again, the intent of the depositor at the time of opening the account and not a subsequently formed intention is determinative.[14] The court in *Murgic*, therefore, held that a subsequently executed will is valueless in determining donative intent at the time the account was created. Since the joint tenancy was properly created, the will could not alter its legal effect.[15]

The *Anderson* decision upheld the legal efficacy of the joint savings account and the revocable trust account as it exists in the mind of the average American saver. This holding was necessary of preserve the vitality of the revocable trust account as a primary savings device. Such accounts fulfill a need of the saver. The revocable trust can solve many problems including tax, gift, business and estate matters. Because of the billions of dollars invested in such accounts, it is important that the trust agreements relied on by the settlor be expressive of the legal effect of these accounts.

It is important, especially in light of this decision, that savings and loan associations advise their customers as to the effects of signing various savings account agreements.[16] The customer's purpose in opening a particular account should be sought out. He should not be misled into believing that he retains full control over his funds in a revocable trust account. The customer's reason for opening such an account may be merely to gain insurance of funds under present provisions of the Federal Savings and Loan Insurance Corporation regulations. Yet, if he is made aware of the fact that the funds in such an account cannot be the subject of his will, he may not open such an account. The necessity of educating or advising savings customers extends to all types of accounts. Many of the "convenience joint savings account" problems would never arise if the creator of the account were aware of the legal effects of joint tenancy.

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13 31 Ill. 2d 587, 202 N.E.2d 470 (1964).

14 Restatement, Trusts § 4, comment a (1935).

15 Eckardt v. Osborne, 338 Ill. 611, 170 N.E. 774 (1930).

16 This does not mean that the new account's officer should give legal advice on estate planning but he should give advice concerning the immediate effect of creating a certain account.